NO. 09-1051

In the

Supreme Court of Texas

FRIENDSWOOD INDEPENDENT SCHOOL DISTRICT and PATRICIA HANKS
Petitioners

v.

NANCY KESSLING
Respondent

On Petition for Review from the
14th Court of Appeals in Houston, Texas

NANCY KESSLING'S RESPONSE TO PETITION FOR REVIEW

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RESTATEMENT OF AND REPLY TO PEITIONER'S ISSUES

1) Case law does not support FISD's argument that Kessling's claims are moot or that there is a conflict of laws.

2) FISD's pattern and practice of repeating the same TOMA violations in the past establishes a justiciable controversy because it satisfies the TOMA's stated intent to stop or prevent a threatened violation of the Act in the future.

SUMMARY OF THE ARGUMENT

FISD's appeal ignores over fifteen years of case law that is contrary to its argument, and instead bases this appeal entirely on a narrow, fact-specific Public Information Act case that is significantly different than the facts of this case. FISD alleges that there is a conflict of case law; that is not true. FISD cannot demonstrate any case that sets out a bright line rule or pleading standard that would deprive Kessling's claims of jurisdiction based on either mootness or speculation.

Kessling explicitly described the pattern and practice of FISD's TOMA violations, citing dates, factual scenarios, and TOMA sections. Kessling was able to amend her petition to show that such violations continue to occur even while this lawsuit is pending. Thus, there is a justiciable controversy here because Kessling's claims are neither moot, nor are they a matter of speculation or conjecture.

ARGUMENT

In its petition of review, FISD asserts that Kessling's assertion of a pattern of past TOMA violations by the FISD does not create a justiciable controversy under the TOMA. (FISD Petition for Review, at p. 5-6). FISD is wrong for two reasons. First, FISD bases its entire TOMA argument on a Public Information Act case—*Cornyn v. City of Garland*—but FISD ignores directly applicable TOMA cases that contradict its legal theory in this case. Second, Kessling did not just seek a ruling about FISD's past violations; those past violations are the proof for Kessling's argument that the FISD is interpreting the TOMA improperly and, as a result, will continue to violate the TOMA in discrete ways absent injunctive or mandamus relief from the court.

1) Case law does not support FISD's argument that Kessling's claims are moot or that there is a conflict of laws.

The Courts have consistently held that just because an open government violation has already occurred in the past does not render the question moot or advisory, nor does it necessarily implicate jurisdiction. *See Finlan v. City of Dallas,* 888 F.Supp. 779 (N.D.Tex. 1995) (granting an injunction ordering Dallas to comply with the OMA in the future where OMA lawsuit was filed after the fact alleging that committee had violated the OMA by meeting in improper executive sessions in the past); *City of Richardson v. Gordon*, --- S.W.3d ----, 2010 WL 986808 (Tex.App.—Dallas, March 18, 2010, no pet. history) (finding that a request for declaratory relief under the TOMA coupled with the potential remedy involving records from improperly held closed meetings, established that the claim was not moot); *City of Austin v. Savetownlake.Org*, 2008 WL 3877683 (Tex.App.—Austin 2008, no pet.) (finding that a claim that the City violated the TOMA in 1999 was not moot, and was ripe for review); *City of Farmers Branch v. Ramos*, 235 S.W.3d 462 (Tex.App.—Dallas 2007, no pet.) (finding that plaintiff filed a valid TOMA lawsuit 3 weeks after the meeting had been held and action taken, and holding that curing an TOMA violation does not moot the original question about whether an TOMA violation occurred); *City of Laredo v. Escamilla*, 219 S.W.3d 14, 19 (Tex.App.—San Antonio 2006, pet. denied) (finding a violation of the TOMA in a lawsuit filed subsequent to the City's action); *Odessa Tex. Sheriff's Posse, Inc. v. Ector County,* 215 S.W.3d 458, 473 (Tex.App.—Eastland 2006, pet. denied) (finding that plaintiff filed a valid TOMA lawsuit after a meeting had been held, and even though another meeting had

been held correcting the earlier violation, action was not moot); *contra City of Galveston v. Saint-Paul*, 2008 WL 384145 (Tex.App.—Houston [1st Dist.] 2008, pet. denied) (memorandum opinion) (distinguishing between the cause of action and the remedy sought, and finding <u>the remedy</u> of invalidation of an option agreement was moot because the agreement had been superceded and could be given no effect); *see generally Houston Chronicle Pub. Co. v. Thomas*, 196 S.W.3d 396, 403 (Tex.App.—Houston [1st Dist.] 2006, no pet.) (discussing what type of pleadings are necessary to avoid advisory opinions in a Public Information Act case and finding that "When a question presented is one of public interest and of recurrent character, jurisdiction is not lost because a threatened act has become an accomplished fact."). Additionally, many TOMA cases indicate that evidence of past violations is traditionally the method of securing injunctive relief to prevent such violations in the future. *See generally Cox Enterprises, Inc. v. Board of Trustees of the Austin Independent School District,* 706 S.W.2d 956 (Tex. 1986) (discussing allegations of past PIA violations regarding posted meeting notices); *Board of Trustees of Austin Independent School Dist. v. Cox Enterprises, Inc.*, 679 S.W.2d 86, 88 (Tex.App.—Texarkana 1984), *aff'd in part, rev'd in part*, 706 S.W.2d 956 (Tex. 1986) (recounting that the trial court found that an injunction was not necessary based on the AISD's assurance "that it would not commit future violations of the Act as finally interpreted by the courts.")

Similarly, relief preventing threatened future violations are not advisory when the regulated entity is consistent in its manner of violating the TOMA. *Harris County Emergency Service Dist. No. 1 v. Harris County Emergency Corps*, 999 S.W.2d 163, 171

(Tex.App.-Houston [14th Dist.], 1999) (allegations of a pattern and practice of past TOMA violations is sufficient to support an injunction preventing such violations form occurring in the future). The facts of *Harris County* closely resemble the facts in Kessling's case, and the underlying court based its ruling on that case.

FISD, on the other hand, presents only one case in support of its position that Kessling's claims are moot: *Cornyn v. City of Garland*, 994 S.W.2d 258 (Tex.App.—Austin 1999, no pet.). *City of Garland* is a Public Information Act case. The Public Information Act requestor/intervenor in *City of Garland* also happened to assert a vague TOMA claim in its TPIA lawsuit.

FISD claims that the *City of Garland* specifically conflicts with *Harris County Emergency Service Dist. No. 1*, and generally conflicts with the above cited TOMA opinions that provide: 1) declaratory judgments for past violations, and/or 2) imposition of injunctive relief for the future. Kessling responds that FISD is overstating *City of Garland* in an attempt to find a conflict of law that would support this appeal. *City of Garland* can be seen to conflict with *Harris County Emergency Service Dist. No. 1* only if this Court reads *City of Garland* to set out a broad and general bright line rule that past violations are never capable of repetition yet evading review.

The *City of Garland* opinion does not indicate how close in time the past violations were to the filed lawsuit, nor does the opinion indicate how specific the requestor/intervenor was regarding the need for specific notices in the future. *City of Garland* does not state any TOMA legal rule or standard applicable to this case. *City of Garland* can be easily harmonized with TOMA cases by simply reading the case for what

it was—a scenario where the facts and the pleadings did not support a TOMA claim. Kessling's claims of past TOMA violations are specific, and the relief she seeks relates directly to those violations. That makes *City of Garland* inapplicable here, and does not support FISD's claims that there is a conflict of laws. This court should deny FISD's petition for mandamus.

2) FISD's pattern and practice of repeating the same TOMA violations in the past establishes a justiciable controversy because it satisfies the TOMA's stated intent to stop or prevent a threatened violation of the Act in the future.

Kessling's lawsuit seeks to prevent several distinct threatened violations of the TOMA by showing that FISD has a pattern and practice of repeatedly violating the TOMA in certain ways. Kessling asserts that FISD's past violations are the equivalent of threatened future violations due to FISD's consistent pattern and practice of engaging in such conduct, and those allegations are proven by the fact that FISD continued to engage in such behavior after Kessling challenged the conduct in this lawsuit.

In support of her "pattern and practice" assertions, Kessling enumerates multiple dates for each specific TOMA violation. For example, Kessling cites 10 meeting dates in support of her claim that FISD improperly notices its executive (closed) sessions by using the generic term "personnel matters"[1] (Kessling's Third Amended Petition, at ¶5.4-5.9);

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[1] These are not uncommon allegations under the OMA. For example, improperly using the generic term "personal matters" to cloak deliberations is a common violation of the OMA. *See Gardner v. Herring,* 21 S.W.3d 767, 777 (Tex.App.—Amarillo 2000, no pet.) (section 551.074 only allows a governmental body to meet in closed session to discuss a specific individual—deliberations about a class of employees or employees in general must be held in open session); *Cox Enterprises, Inc. v. Board of Trustees of the Austin Independent School District*, 706 S.W.2d 956, 958 (Tex. 1986); ("personnel" was not sufficient to apprise the public that the board would select a new superintendent); *Mayes v. City of DeLeon,* 922 S.W.2d 200 (Tex.App.—Eastland 1996, writ denied) ("personnel" was not sufficient to terminate police chief); *Point Isabel Indep. Sch. Dist. v. Hinojosa,* 797 S.W.2d 176 (Tex.App.—Corpus Christi 1990, writ denied) ("employment of personnel" was not sufficient to describe the hiring

Kessling cites 13 meetings dates in support of her allegations that FISD holds executive sessions which subvert the purpose of closed meetings because FISD allows all manner of FISD employees into those closed meetings (Kessling's Third Amended Petition, at ¶5.13-5.18); Kessling cites 3 meeting dates in support of her allegations that the FISD deliberated about public business in an executive session after adjourning the scheduled meeting (Kessling's Third Amended Petition, at ¶5.19). As the lawsuit proceeded from its initial August 2006 filing date, Kessling amended her petition to include the dates upon which the continuing violations were repeated. (Kessling's Third Amended Petition, at ¶5.16, indicating a repeat violation on December 12, 2006; ¶5.20, indicating repeat violations on December 12, 2006 and January 9, 2007).

Logic tells us that if an agency has a "pattern and practice" of interpreting the law in a manner that allows them to engage in certain behavior, then, absent a change in their understanding of the law, the agency will continue to behave as it always has. There can be no better evidence of a "de facto policy" than showing discrete violations repeated again and again. Kessling alleged continuing violations of the TOMA in these discrete areas, and amended her claims to show that those violations continued even after she had filed this lawsuit. Kessling's allegations, and the relief that she sought regarding each of the TOMA violations—namely, that FISD be instructed that each particular type of

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of principal); Op. Tex. Att'y Gen. No. DM-251 (1993) (a school district may not conduct termination hearings in a closed session when a teacher requests a public hearing); Op. Tex. Att'y Gen. No. JM-1112 (1989) (discussing notice requirements for a consideration of a grievance in a school board's executive session and finding "ordinarily, the employee's name should be included in the notice [of intent to enter into executive session]."); Op. Tex. Att'y Gen. No. H-1045 (1977) ("personnel changes" is insufficient to describe the selection of the university president);Op. Tex. Att'y Gen. No. H-496 (1975).

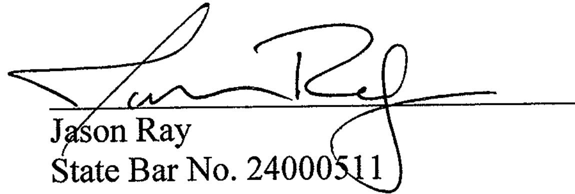
activity is a violation of the TOMA, and that FISD be instructed to stop or enjoined from engaging in that activity—show that Kessling believes that further violations of the TOMA are imminent. The fact that she was able to amend her petition to show the continuing violations shows that she was right, and her claims were not and are not speculative. Her lawsuit properly requested a declaratory judgment on FISD's past actions, and an injunction to prevent FISD from repeating those same TOMA violations in the future.

By alleging a "pattern and practice" of Open Meeting violations even after this lawsuit was filed, Kessling overcame any advisory opinion arguments because she showed that <u>the content of notices of *future* FISD meetings</u>, as well of the conduct in those meetings, is not a matter of speculation or conjecture. FISD's pattern and practice of *past* Open Meeting Act violations is important for the same reason—it shows that FISD does not follow the law. FISD's petition should therefore be denied.

PRAYER

FOR THESE REASONS, Respondent Kessling prays that this Court deny the Friendswood Independent School District and Patricia Hanks' Petition for Review.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by first class mail on March 22, 2010 to the following:

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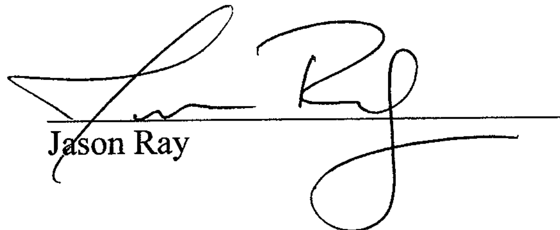

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